KEJURUTERAAN SUPERSKILL SDN. BHD. PERAK

v.

KESATUAN PEKERJA-PEKERJA PERUSAHAAN ALAT-ALAT PENGANGKUTAN DAN SEKUTU

HIGH COURT, TAIPING
DATO' HAJI ABDUL MALIK BIN HAJI ISHAK JC
[ORIGINATING MOTION NO 25-18-93 (T)]
29 APRIL 1994

ADMINISTRATIVE LAW: Application for certiorari - Industrial Court ruling that employee unfairly dismissed - Whether Industrial Court erred in jurisdiction when it considered the facts of the case in the context of ss. 15(2) and 60F(2)(b) of the Employment Act 1955.

INDUSTRIAL LAW: Employee absenting himself from work for more than 2 consecutive working days - Whether contract of service broken - Medical leave - Whether employee had reasonable excuse for absence - Whether employee informed or attempted to inform employer - Burden of proof on employee - Sections 15(2) and 60F(2)(b) of Employment Act 1955.

This is an application for *certiorari* by the employer, seeking to impugn the decision of the Industrial Court solely on the facts of the case.

Issues

(1) Whether the employee had a reasonable excuse for absenting from work for more than 2 consecutive days.
(2) Whether the employee had informed or attempted to inform the applicant of such absence at the earliest opportunity during such absence.
(3) Whether the Industrial Court in finding that the employee was unfairly dismissed, committed an error in jurisdiction.

Held:

[1] In appraising ss. 15(2) and 60F(2)(b) of the Employment Act 1955 respectively, the Industrial Court had rightly put the burden of proof on the Employee. The Employee successfully discharged his burden by having tendered in evidence the medical certificates supported by his wife's evidence that attempts were made to inform the applicants of the reasons for his absence.

[2] The Chairman of the Industrial Court had correctly decided the case when he considered the facts of the case in the context of ss. 15(2) and 60F(2)(b) of the Employment Act 1955. He has appreciated good law and his decision was made in good faith. The Industrial Court did not act in excess of jurisdiction.

[Application for certiorari dismissed with costs to the respondent].

Per Curiam: "It has been said time and time again that *certiorari* should never be used by way of a disguised appeal from findings of facts".

Cases referred to:
Anisminic v. Foreign Compensation Commission [1969] 2 AC 147 ***(foll)***
South East Asia Fire Bricks Sdn. Bhd. v. Non-Metallic Mineral Products Manufacturing Employees Union & Ors. [1980] 2 MLJ 165 ***(foll)***
Hotel Equatorial (M) Sdn. Bhd. v. National Union of Hotel, Bar & Restaurant Workers & Anor. [1984] 1 MLJ 363 ***(foll)***
Tan Hin Jin & Anor. v. Doshi [1971] 1 MLJ 274 ***(refd)***
R v. Northumberland Compensation Appeal Tribunal [1952] 1 KB 338 ***(refd)***
Dr A. Dutt v. Assunta Hospital [1981] 1 MLJ 304 ***(foll)***

Legislation referred to:
Employment Act 1955, ss. 15(2), 60F(2)(b)
Industrial Relations Act 1967, s. 20(3)
Rules of the High Court 1980, O. 53 r. 1(1)

Other sources referred to:
Mallal's Supreme Court Practice, Tan Sri Datuk Chang Min Tat, 2nd Edn., Vol. 1, P. 649, Column 53/1/9

For the applicant - Arthur Yeong (Suhaida bt. Kassim with him); M/s Arthur Yeong & Associates
For the respondent - Ashok K. Raman; M/s Daim & Gamany

JUDGMENT

Haji Abdul Malik bin Haji Ishak JC:

Mohan s/o Chelliah ("Mohan") represented by the respondent, was an employee of the applicant. It was alleged by the applicant that Mohan had a bad track record. There were two warning letters (exhibits NCB2 dated 18 March 1991 and NCB3 dated 4 May 1991 of enclosure 3) against Mohan for absenting himself from work without leave. Mohan joined the applicant in February 1989 (here there was a dispute, the applicant said that Mohan joined the company on 10 October 1989). Be that as it may, Mohan was paid daily at the rate of RM21.50 per day with an average income of RM559 per month. Mohan was on valid medical leave continuously

without a break from 22 May 1991 to 25 May 1991. The two medical certificates were issued by the government clinic at Tanjong Rambutan. On 27 May 1991 when Mohan reported for work (26 May 1991 was a Sunday), he was told that his services were no longer required and that the applicant had dismissed him. Mohan took cudgel and claimed unfair dismissal and the matter was referred to the Industrial Court under s. 20(3) of the Industrial Relations Act 1967 ("the Act").

The applicant contended that Mohan was not dismissed as alleged but rather he broke his contract of service by absenting himself for more than 2 consecutive working days without leave or permission. The applicant further contended that they were in no position to know that Mohan was on medical leave on those days. It was alleged that Mohan had ample time and opportunity to inform the applicant and to check whether the applicant had been informed.

It was Mohan's case that the applicant had dismissed him. It was submitted that the letter from the applicant to Mohan dated 25 May 1991 bore testimony to such dismissal. That letter reads as follows: :

> Date: 25 May 1991
> Mohan a/l Chelliah
> No. 749, Taman Tun Sambanthan
> 31100 Sg. Siput (U)
> PERAK
>
> Dear Mohan
>
> Re: **Absent From Work Without Leave**
>
> It has come to our notice that you have been absent from work without leave since 22 May 1991.
>
> By virtue of s. 15(2) of the Employment Act 1955, you are deemed to have broken your contract of service with the company.
>
> Your services are no longer required by the company. You may collect your balance wages from the Accounts Department on any working day.
>
> Thank you.
>
> Yours faithfully,
>
> Kejuruteraan Superskill Sdn. Bhd.
> Signed
> (Mr B. C. Ng)
> Asst. Factory Manager.
>
> c.c. Penolong Pengarah Buruh
> Jabatan Buruh
> Kuala Kangsar.

For convenience, s. 15(2) of the Employment Act 1955 (Act 265) (Revised 1981) ("the Employment Act") is reproduced below:

> An employee shall be deemed to have broken his contract of service with the employer if he has been continuously absent from work for more than two consecutive working days without prior leave from his employer, unless he has a reasonable excuse for such absence and has informed or attempted to inform his employer of such excuse prior to or at the earliest opportunity during such absence.

Thus, the issue crucial for determination by the Industrial Court was, whether Mohan had a reasonable excuse for such absence and whether he informed or attempted to inform the applicant of such absence at the earliest opportunity during such absence? The chairman of the Industrial Court embarked on the analysis of the evidence of Mohan's wife and concluded that:

> Since the claimant was on valid medical leave from 22 May 1991 to 25 May 1991 and had taken reasonable attempt to inform the company through his wife CLW3, the claimant (Mohan) could not be regarded as having been continuously absent from work without reasonable excuse.

In any event, the Industrial Court ordered the applicant to pay back wages for a period of 24 months and 14 days amounting to RM13,717 to Mohan. The applicant was also ordered to pay compensation in lieu of reinstatement amounting to RM12,614 (after deducting 20% described as contribution by Mohan).

Mr Arthur Yeong, learned Counsel for the applicant, applied for *certiorari* and sought to impugn the decision of the Industrial Court solely on the facts of the case. Mr Ashok K. Raman, learned Counsel for Mohan argued to the contrary.

The Industrial Court is a statutory creature. The Act gives life to it. But the Industrial Court as an inferior tribunal could not claim total immunity from review. Its decision or order is subject to review by the High Court. In short, the High Court is not ousted from correcting the error of the Industrial Court by means of *certiorari* if the error affects the jurisdiction of the Industrial Court where it exceeded or acted without jurisdiction so that its decision or order is a nullity (*Anisminic v. Foreign Compensation Commission* [1969] 2 AC 147, *South East Asia Fire Bricks Sdn. Bhd. v. Non-Metallic Mineral*

Products Manufacturing Employees Union & Ors [1980] 2 MLJ 165).

As to the function of the High Court in regard to its supervisory jurisdiction over inferior tribunals, George Edward Seah FJ (as he then was) had this to say in *Hotel Equatorial (M) Sdn. Bhd. v. National Union of Hotel, Bar & Restaurant Workers & Anor.* [1984] 1 MLJ 363, especially at page 371:

> In the exercise of its inherent supervisory jurisdiction over inferior tribunal of limited jurisdiction the High Court must always remember that it is not sitting as a Court of Appeal to review the findings of the inferior tribunals. The High Court, it must be observed, has no jurisdiction to consider the merits of the case; its only function is to consider whether the inferior tribunal has performed its duties according to law. Clear distinction must be maintained between want of jurisdiction and the manner of its exercise, otherwise, review for jurisdictional error will be equivalent to review on merit.

Mallal's Supreme Court Practice, 2nd Edn., Vol. 1 by Tan Sri Datuk Chang Min Tat at page 649 under column 53/1/9 described *certiorari* as a potent remedy for the following situations:

> *Certiorari* will lie to quash a decision which has already been made by an inferior Court or administrative tribunal or other public authority in excess or abuse of jurisdiction or contrary to the rules of natural justice: it will also lie where there is an error of law on the face of the decision of such a tribunal. An order of *certiorari*, by these rules, will lie whenever the issue of a writ of *certiorari* would have been ordered, in the exercise of the supervisory capacity of the High Court over inferior Courts or tribunals.

The Industrial Court had, on the evidence before it, weighed on balance, the two versions put forth by Mohan and the applicant. Needless to say, the evidence was microscopically analysed and the Industrial Court made solid findings of fact which sealed the fate of the applicant. It has been said time and again that *certiorari* should never be used by way of a disguised appeal from findings of fact. This is what the applicant is doing and for that, the applicant must attempt to surmount that barrier which unfortunately, he never did (see *Tan Hin Jin & Anor v. Doshi* [1971] 1 MLJ 274, 275 citing favourably *R v. Northumberland Compensation Appeal Tribunal* [1952] 1 KB 338).

Next, the question to pose is this: Was there jurisdictional error on the part of the Industrial Court? The Industrial Court rightly construed s. 15(2) of the Employment Act in favour of Mohan after taking into account as stated earlier the two medical certificates and the evidence of Mohan's wife to the effect that attempts were made to inform the applicant of Mohan's predicament. Section 60F(2)(b) of the Employment Act (which enacts that an employee who absents himself on sick leave which is certified by a registered medical practitioner but without informing or attempting to inform his employer of such sick leave within forty eight hours of the commencement thereof shall be deemed to absent himself from work without the permission of his employer and without reasonable excuse for the days on which he is so absent from work) was also rightly considered by the Industrial Court in the context of the facts of the case. In appraising both these two sections, the Industrial Court rightly put the burden of proof on the shoulders of Mohan. From the available material, the Industrial Court rightly concluded that Mohan had discharged his burden and further there is nothing on record to show that the Industrial Court had exceeded its jurisdiction when it considered the facts of the case in the context of ss. 15(2) and 60F(2)(b) of the Employment Act.

The word "jurisdiction" has caused some disquiet. Lord Reid in *Anisminic v. Foreign Compensation Commission (supra)* shed some light on the meaning of that word. His Lordship said:

> It has sometimes been said that it is only where a tribunal acts without jurisdiction that its decision is a nullity. But in such cases the word "jurisdiction" has been used in a very wide sense, and I have come to the conclusion that it is better not to use the term except in the narrow and original sense of the tribunal being entitled to enter on the inquiry in question. But there are many cases where, although the tribunal had jurisdiction to enter on the inquiry, it had done or failed to do something in the course of the inquiry which is of such a nature that its decision is a nullity. It may have given its decision in bad faith. It may have made a decision which it had no power to make. It may have failed in the course of the inquiry to comply with the requirements of natural justice. It may in perfect good faith have misconstrued the provisions giving it power to act so that it failed to deal with the question remitted to it and decided some question which was not remitted to it. It may have refused to take into

account something which it was required to take into account. Or it may have based its decision on some matter which, under the provisions setting it up, it had no right to take into account. I do not intend this list to be exhaustive. But if it decides a question remitted to it for decision without committing any of these errors it is as much entitled to decide that question wrongly as it is to decide it rightly. I understand that some confusion has been caused by my having said in *Reg v. Governor of Brixton Prison, Ex parte Armah* [1968] AC 192, 234 that if a tribunal has jurisdiction to go right it has jurisdiction to go wrong. So it has, if one uses 'jurisdiction' in the narrow original sense. If it is entitled to enter on the inquiry and does not do any of those things which I have mentioned in the course of the proceedings, then its decision is equally valid whether it is right or wrong subject only to the power of the Court in certain circumstances to correct an error of law.

Here, the chairman of the Industrial Court appreciated good law and his decision was not made in bad faith. He had complied with the requirements of natural justice. He did not misconstrue the provisions of the Employment Act and he took into account all that which was supposed to be taken into account.

Next, the question to pose would be: Whether Mohan in a reference for reinstatement can be awarded compensation by the Industrial Court? Fortunately, this point was similarly dealt with, on a different set of facts, by the then Federal Court in *Dr A. Dutt v. Assunta Hospital* [1981] 1 MLJ 304, especially at page 313 where Chang Min Tat FJ (as he then was) said:

The right to compensation must be an issue in representations for reinstatement and necessarily arises where the Court would not order reinstatement. And this is apart from the duty of the Court to act according to 'equity, good conscience and the substantial merits of the case without regard to technicalities and legal form.' 'The Court shall not be restricted to the specific relief claimed' must in the case of representations for reinstatement under s. 20(1), which we have observed is the logical claim to be made by the workman, mean an award not only in addition to the order for reinstatement, but also in compensation for the reinstatement that the Court would not award. Confirmation for this interpretation can be found in the subsequent words 'may include in the award any matter or thing which it thinks necessary or expedient for the purpose of setting ... the reference to it under s. 2(3).

In another part of the judgment, his Lordship concluded (see page 314 left hand column):

We are of the opinion that upon a true interpretation, the Industrial Court may properly award compensation where the dismissal is without just cause or excuse, if, in its considered view, it does not think reinstatement should be ordered.

I would, accordingly, agree with the decision of the Industrial Court on this point. The Industrial Court was perfectly correct in awarding compensation to Mohan in lieu of reinstatement.

Finally, a potent point overlooked by all parties is this. There was a blatant failure on the part of the applicant to obtain leave within the meaning of O. 53 r. 1(1) of the Rules of High Court 1980. Without leave, the applicant had no leg to stand on. That by itself would terminate the applicant's application for certiorari. Costs should rightly go to the respondent.